Supreme Court, U.S.
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No. 95-1361

In the Supreme Court of the United States

OCTOBER TERM, 1995

ZELL MILLER, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL CROSS-RESPONDENTS

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QUESTIONS PRESENTED

Section 315(b) of the Communications Act of 1934, 47 U.S.C. 315(b), provides that, during certain periods, broadcast stations must charge political candidates, for their campaign advertising, the "lowest unit charge of the station for the same class and amount of time for the same period." In a declaratory ruling, the Federal Communications Commission (FCC) concluded that all state-law causes of action dependent on a determination of a broadcast station's lowest unit charge had been preempted by Congress, and should be preempted by the FCC under its own authority. The questions presented by the cross-petition are:

1. Whether a case or controversy is presented by respondents' challenge to the declaratory ruling.

2. Whether the FCC properly concluded under its own authority that state-law causes of action dependent on a determination of the lowest unit charge should be preempted.

3. Whether Congress preempted state-law causes of action dependent on a determination of the lowest unit charge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a)[1] is reported at 66 F.3d 1140. The declaratory ruling of the Federal Communications Commission (FCC) (Pet. App. 16a-47a) is reported at 6 F.C.C. Rcd 7511. The FCC's order on reconsideration (Pet. App. 48a-86a) is reported at 7 F.C.C. Rcd 4123. The FCC's notice of its intention to issue a declaratory ruling (Pet. App. 87a-94a) is reported at 6 F.C.C. Rcd 5954.

[1] In this brief, "Pet." refers to the petition in No. 95-1200, and "Pet. App." refers to the appendix to that petition. "Br. in Opp." refers to the candidates' brief in opposition to the petitions in No. 95-1197 and No. 95-1200. "Cross-Pet." refers to the cross-petition, No. 95-1361.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1995. On December 21, 1995, Justice Kennedy entered an order extending the time within which to file a petition for a writ of certiorari to and including January 26, 1996. Petitions for a writ of certiorari in No. 95-1197 and No. 95-1200 were filed on January 26, 1996. The cross-petition for a writ of certiorari was filed on February 26, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The background to this case is set forth in detail in our petition (at 3-14). This case involves preemption of state law under Section 315(b)(1) of the Communications Act of 1934, 47 U.S.C. 315(b)(1), which provides that, during the 45 days before primary elections and the 60 days before general and special elections, broadcast stations must charge legally qualified political candidates "the lowest unit charge of the station for the same class and amount of time for the same period." Before 1990, the lowest-unit-charge rule was enforced exclusively by the FCC (with the exception of one Texas statute that was ultimately held to be preempted).[2]

Beginning in 1990, however, candidates for public office began filing lawsuits against broadcasters in state and federal courts, arguing either that the broadcasters had violated Section 315(b) (which was said to have created a private right of action) or, more commonly, that the broadcasters had violated their

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[2] See *KVUE, Inc.* v. *Moore*, 709 F.2d 922 (5th Cir. 1983), aff'd mem., 465 U.S. 1092 (1984).

contractual obligations, enforceable under state law, to adhere to the federal lowest-unit-charge rule. See Pet. App. 88a-89a. In one of those cases, brought by respondent Zell Miller, the federal district court dismissed the complaint and held that the FCC had exclusive authority to provide a remedy for violations of Section 315(b), but in another case brought by respondent William Dickinson, the district court held that the lawsuit did not present a question arising under federal law, and remanded it to the state courts, where the case is still pending. Pet. App. 88a-89a.

After reviewing the litigation that had arisen involving Section 315(b), the FCC issued, on December 13, 1991, a declaratory ruling that "any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) * * * is preempted by federal law," and that "[t]he sole forum for adjudicating such matters shall be [the FCC]." Pet. App. 16a. In its ruling, the FCC first concluded that "Congress by implication preempted state causes of action of which alleged violations of Section 315(b) are an integral part." *Id.* at 19a. It explained that private litigation in courts around the country over the requirements of Section 315(b) would conflict with Congress's establishment of the FCC as the "centralizing authority" overseeing the "unified and comprehensive regulatory system" governing interstate communications, and political broadcasting in particular. Pet. App. 20a.

The FCC also concluded that it should exercise its own authority to preempt state-law claims based on violations of Section 315(b), whether or not Congress expressly or by implication had preempted such claims. Pet. App. 21a-25a. The FCC stated that preemption of such claims "is necessary to allow the

Commission to 'achieve its purposes' by developing uniform standards for interpreting and enforcing Section 315(b)." Pet App. 22a. Absent preemption, the FCC found, "[r]ulings by courts in numerous jurisdictions around the country almost certainly would produce varying and possibly conflicting determinations" that "would leave both candidates and broadcasters unsure of their respective rights and responsibilities." *Id.* at 22a-23a. Moreover, the FCC pointed out, lawsuits in various States would contravene Congress's objective of removing obstacles to political broadcasting, since it would be "difficult, if not perilous, for broadcasters who serve more than one jurisdiction to provide various candidates prompt, authoritative quotes for the lowest unit charge available to them" (*id.* at 23a), and the prospect of such lawsuits around the country "might encourage some stations simply to refuse to accept political advertisements" (*id.* at 24a).

2. The court of appeals "dismiss[ed]" (Pet. App. 15a) a petition for review of the declaratory ruling brought by a group of political candidates (respondents). *Id.* at 1a-15a. After describing the proceedings before the FCC, the court considered its own jurisdiction to review the declaratory ruling, remarking that "it is necessary to characterize appropriately the FCC action [under review]." *Id.* at 9a-10a. The court then stated:

> The Commission's declaratory ruling—that Congress (or the Commission itself) has preempted the jurisdiction of state courts and federal district courts, in diversity cases, when the candidate claims that the broadcaster's rates exceeded the lowest unit charge—is not a regulation prom-

> ulgated pursuant to section 315(d). * * * [T]he ruling does not define statutory terms, dictate the use of certain industry practices, or prescribe appropriate methods for calculating the lowest unit charge. Furthermore, the declaratory ruling is not an adjudication of a pending case involving a dispute between a candidate and a broadcast station licensee. It is not a decision, a letter of admonition, or an order levying a penalty of forfeiture, a loss of operating authority, or a refund to the candidate.

Id. at 10a. The court further remarked:

> Because it is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction, the FCC's declaratory ruling amounts to an agency opinion—a pronouncement interpreting the Communications Act to the effect that Congress impliedly abolished state and federal court jurisdiction over lowest unit charge violations.

Ibid. (footnote omitted). The court cited no authority for its "axiomatic" proposition.

Having thus "characterize[d]" the FCC's action, the court of appeals concluded that it lacked jurisdiction over the petition for review, because (it believed) there was no case or controversy present. The court stated that, "[e]ssentially, [the candidates] ask this court to declare whether, at some future date, a candidate may bring a breach of contract action in state court contending that a broadcaster's rates exceeded the lowest unit charge and seeking recovery of the overcharge." Pet. App. 12a (footnote omitted). It also remarked that the only question presented in

such a case would be "whether Congress has foreclosed the power of the state court[s]" to entertain suits by candidates against broadcasters. *Id.* at 12a-13a. But, disregarding the fact that at least one of the candidates before the court had (and has) just such a lawsuit against a broadcaster pending in Alabama state court (*id.* at 6a n.2), the court concluded that, "[b]y asking this court to decide what another court should do in a future case, [the candidates] are posing a hypothetical question, the answer to which would be an advisory opinion." *Id.* at 13a.

Although the court therefore stated that it would refuse to rule on the petition for review, it also stated that its "refusal to answer the question [the candidates] pose will not preclude them from obtaining an answer. Any of them who have been or may in the future be overcharged by a broadcaster while running for public office may seek judicial relief." Pet. App. 15a. But, repeating its conclusion that "no case or controversy is presented," the Court stated, "we DISMISS the petition for review." *Ibid.*

DISCUSSION

1. In our petition (No. 95-1200), we show that the court of appeals erred in concluding that the FCC lacked authority to provide, by declaratory ruling, that state-law causes of action dependent on a determination of a broadcaster's lowest unit charge should be preempted. Although respondents oppose our petition, they argue that, if the Court grants certiorari, it should also consider whether the court of appeals had jurisdiction over the case, whether the FCC properly decided to preempt state law, and whether Congress preempted state-law causes of action. See Cross-Pet. 6-8.

We do not oppose the granting of the cross-petition on those issues. As we explain in our reply brief in support of our petition (at 2-3), the issues of jurisdiction and the merits of the FCC's decision to preempt under its own authority are subsumed within the questions presented by our petition. Judicial economy and regulatory certainty would be served by the Court's resolution of the question of Congress's preemptive intent as well. The FCC's declaratory ruling was intended to provide definitive guidance as to Congress's intent in Section 315(b), and that objective would be advanced by this Court's resolution of the preemption issue. Furthermore, the FCC's analysis of Congress's preemptive intent was closely connected to its decision on its own initiative to preempt state law, in that both conclusions involved the agency's analysis of Congress's objectives. See, *e.g.*, Pet. App. 19a-20a, 22a-23a (declaratory ruling's discussion, in both contexts, of statutory objectives of consistency, certainty, and uniformity). Accordingly, the Court should grant the cross-petition to address the entire issue of preemption, in both the statutory and administrative contexts.

2. In their cross-petition, respondents present several arguments on the merits of the case. Similar arguments are also made in their brief in opposition to the government's petition in No. 95-1200, and we have addressed them in our reply brief in that case.

CONCLUSION

The cross-petition for a writ of certiorari should be granted.

Respectfully submitted.

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